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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Pay Telephone  
Reclassification and Compensation  
Provisions of the Telecommunications  
Act of 1996

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CC Docket No. 96-128

REPLY OF PAGING NETWORK, INC.  
IN SUPPORT OF ITS  
PETITION FOR LIMITED RECONSIDERATION

PAGING NETWORK, INC.

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## SUMMARY

Confusing substantial inequity with special interest, the parties opposing PageNet's petition for reconsideration misinterpret the proposal to adopt a measured compensation amount. The flat-rate compensation adopted in the *Second R&O* unreasonably ignores differences in the duration of calls originating from payphones and substantially burdens short duration calls. PageNet asks the Commission to correct this inequity by prescribing compensation that varies with the duration of the call (subject to a reasonable cap).

For defenders of flat-rate compensation, their position depends upon one critical, but unsupported, assumption: that "over time, the duration of the calls averages out for everyone: the caller, the 800 subscriber, and the PSP" (APCC Opposition at 39). The Commission may ignore call duration as a factor *only* if there are no material differences in the average duration for each call, for each call type, and for each 800 subscriber ultimately responsible for paying compensation. On this critical issue, APCC and the other commenters come up short. There is no evidence that call durations "average[] out for everyone." To the contrary, the record is replete with evidence that call durations are *not* the same for every user or for every type of use. Therefore, to be fair, compensation must reflect these differences, by establishing a measured compensation amount.

Some IXCs oppose PageNet's proposal on the ground that their systems currently are not prepared to process compensation on a measured basis. While PageNet can sympathize with the IXCs' concern about adding to the already substantial costs they have had to bear to implement payphone compensation, these IXCs provide the Commission with precious little information to respond to their concerns. It appears that tracking the duration of payphone calls is not a significant problem whatsoever, although some modifications will be necessary to allow IXCs to pay PSPs on a

measured basis. PageNet suggests that the best way to deal with this concern is to provide IXC's with a reasonable transition period to implement the necessary changes to their compensation systems. In the interim, immediate action is required to address the substantial inequity flat-rate compensation imposes on short duration calls. To address this problem, the Commission should set compensation for all calls above a one-minute threshold at a flat-rate, equal to the default compensation amount adopted in this proceeding (whether it be 28.4 cents or a revised level). Calls of one minute or less, however, should pay a different, lower rate, which is equal to the default rate divided by the average duration of a dial around call. Thus, if the average duration is 4 to 7 minutes, compensation should be set at between one-fourth and one-seventh of the default compensation rate.

Finally, procedural arguments attacking the sufficiency of the notice and quibbling with the level of the cap on compensation are without merit. Measured compensation is a logical outgrowth of the Commission's NPRM. Moreover, a cap is reasonable to ensure that long duration calls do not pay excessive compensation, and a ten-minute cap is reasonably aimed to capture most calls at the measured rate.

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**REPLY OF PAGING NETWORK, INC.  
IN SUPPORT OF ITS  
PETITION FOR LIMITED RECONSIDERATION**

Paging Network, Inc. ("PageNet"), on behalf of its operating subsidiaries, respectfully replies to comments opposing its petition for reconsideration of the Federal Communications Commission's ("FCC" or "Commission") *Second Report and Order* ("*Second R&O*") released October 9, 1997, in the above-captioned proceeding.<sup>1/</sup> As set forth in PageNet's Petition, the Commission should prescribe compensation on a per-increment of use basis (*e.g.* in 6-second increments), subject to a cap to prevent excessive compensation payments.

**I. A MEASURED RATE IS THE ONLY FAIR WAY TO ALLOCATE PAYPHONE COMPENSATION AMONG CALLS**

Because the inequity of flat-rated compensation is so extreme in PageNet's situation, some commenters misinterpret PageNet's proposal as special interest pleading. But PageNet is not seeking to exempt itself from the statute. It only asks the Commission to set

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<sup>1/</sup> Of the twelve oppositions received by the Commission, four (APCC, AT&T, RBOC/GTE/SNET Coalition ("LEC PSPs") and Sprint) addressed PageNet's measured rate proposal.

compensation in a way that reflects the differences among compensable calls. Flat-rate compensation is inequitable because it disproportionately impacts short duration calls. For example, on inbound 800 calls lasting less than 30 seconds, the Commission's 28.4 ¢/call compensation rate would be over 7 times the average price of the call itself.<sup>2/</sup> A measured rate, on the other hand, accounts for different call durations in a way that is fair for "each and every completed . . . call originating from a payphone."<sup>3/</sup> Therefore, PageNet proposes a general rule (not a special exemption), which, when applied to all calls, will yield compensation amounts commensurate with the individual characteristics of each call.

The LEC PSPs thus are wrong in claiming that PageNet seeks to avoid paying its "fair share" to payphone providers.<sup>4/</sup> PageNet does not object to paying compensation, nor does it seek to deny PSPs payment for use of their payphones. But PageNet *is* seeking to have that compensation defined fairly. The LEC PSPs' argument in opposition to the Petition begs the very question that PageNet raises: is flat-rate compensation "fair compensation" as required by Section 276?

Ironically, the APCC touches upon the heart of the issue when it asserts that "over time, the duration of the calls averages out for everyone: the caller, the 800 subscriber, and the PSP."<sup>5/</sup> The fairness of a flat-rate compensation system depends upon the accuracy of this very statement. The Commission may ignore call duration as a factor in determining the

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<sup>2/</sup> Paging Network Inc.'s Petition for Limited Reconsideration, at 6-7 (*Petition*) (assuming an average cost of \$.08 per minute, billed in six second increments).

<sup>3/</sup> 47 U.S.C. § 276.

<sup>4/</sup> LEC PSPs Opposition at 9.

<sup>5/</sup> APCC Opposition at 39.

compensation amount *only* if, as APCC claims, it all comes out even in the end. That is, it is fair to prescribe a single flat rate per-call only if among every 800 subscriber, the average call duration is the same. If there are material differences among calls, among call types, or among subscribers, however, reasoned decisionmaking requires the Commission to take those differences into account in the compensation rate.

Tellingly, APCC offers no citation for the proposition that "over time, the duration of the calls averages out for everyone." Though it previously submitted payphone-specific data derived from SMDR call records, APCC did not present any SMDR data to support this assertion.<sup>6/</sup> Moreover, APCC did not present data that certain *classes* of calls (*e.g.*, subscriber 800 calls) have similar call durations. Nor did it offer any evidence to refute PageNet's own experience that its average -- for *all* of its inbound 800 calls -- is less than 30 seconds per call.<sup>7/</sup> Instead, APCC's assertion is wholly unsupported.

The record evidence, on the other hand, clearly refutes APCC's assertion. The tens of millions of inbound 800 calls PageNet receives each month are extremely short, averaging less than 30 seconds. Many other entities are similarly situated, including other paging providers, trucking dispatch companies, and certain messaging providers. Some other uses of inbound 800 services, such as a bank's provision of customer account information, have durations averaging approximately three minutes.<sup>8/</sup> The LEC PSPs submitted evidence

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<sup>6/</sup> Payphones equipped with SMDR are capable of recording, among other things, how long a payphone is off hook on a call. Thus, if call durations do "average[] out for everyone," presumably that fact would be reflected in the SMDR data APCC has collected.

<sup>7/</sup> See PageNet Remand Reply Comments at 13 (Sept. 9, 1997).

<sup>8/</sup> PageNet Remand Reply Comments at 13-14.

purporting to show that access code calls average nearly 4 minutes per call.<sup>9/</sup> Furthermore, the Commission and its staff have concluded that operator service calls (which include 0+ calls as well as access code calls) are even longer, averaging 7 to 7.5 minutes per call.<sup>10/</sup> The Commission cannot ignore a record replete with such evidence. *Illinois Public Telecomm. Assn v. FCC*, 117 F.3d 555, *clarified*, 123 F.3d 693 (D.C. Cir. 1997) (FCC erred in concluding that the costs of all calls are similar when the record was replete with evidence to the contrary).

Even more strained that APCC's unsupported assertion that call durations "average[] out for everyone," is the LEC PSPs' claim that the issue is academic because the D.C. Circuit "implicitly approved" flat-rate compensation.<sup>11/</sup> The LEC PSPs' entire argument is based on the Court's use of the phrase "per-call compensation" when addressing the carrier-pays mechanism. However, the method of calculating compensation for a particular call was not relevant to the quoted portion of the Court's opinion -- which dealt only with *who* pays compensation, the caller placing the call or the carrier receiving it. The Court did not approve, implicitly or otherwise, flat-rate compensation when it deferred to the Commission in requiring carriers to pay compensation rather than the caller using the phone.

Moreover, even if the Court's choice of the phrase "per-call compensation" in that context were somehow significant, it does not preclude the FCC's adoption of a measured

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<sup>9/</sup> LEC PSPs Remand Comments at Andersen Report, p. 10 (August 26, 1997).

<sup>10/</sup> Final Report of the FCC pursuant to TOCSIA, at Attachment N (Lande Report), Table 4 (AT&T, MCI and Sprint carried 2.8 billion calls lasting 20.9 billion total minutes); *Billed Party Preference for 0+ InterLATA Calls*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd. 7274, ¶ 35 (1996).

<sup>11/</sup> LEC PSPs Opposition at 8.

compensation rate. As PageNet discussed in its Petition, Section 276's requirement of "per-call compensation" is to be contrasted with the FCC's then-existing system of "per-phone" compensation.<sup>12/</sup> By mandating "per-call" compensation, Congress meant only to require that each and every payphone call trigger some compensation. Nothing in the phrase "per-call compensation" mandates the amount of such compensation, or that the amount be the same for every call (or class of calls). Rather, because a measured rate ensures that each and every call contributes some compensation -- but only that compensation which is fair -- it is a "per-call" compensation system consistent with Section 276. No commenter refuted this analysis.

Finally, jumping to the PSPs' defense, AT&T argues that measured compensation is inappropriate because PSP costs are incurred on a per-call basis, not a per-minute basis.<sup>13/</sup> The only plausible support for this proposition is the fact that commenters (and the FCC) previously divided costs by the number of calls originating from a payphone, rather than by a timed-increment measure, such as the number of minutes of use. Though that expedient certainly does not prove that costs are "incurred" on this basis, the Commission need not quibble over semantics. What AT&T wholly ignores is that, even if costs are incurred on this basis, PSPs do not *recover* those costs on a flat-rate basis. Instead, every other call -- including toll calls billed by IXC's -- involves charges based on the duration of use. This is true for 1+ sent-paid calls; for 0+ calls and 0+ commissions; and for IXC charges on access code and subscriber 800 calls. It also is true for local coin calls, where PSPs are free

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<sup>12/</sup> *Petition* at 11-12.

<sup>13/</sup> *AT&T Opposition* at 8-9.

to determine the length of the initial and subsequent periods associated with the deposit of coins.<sup>14/</sup>

No commenter offers a persuasive reason for departing from this practice in the case of payphone compensation costs. All other toll calls are rated based on their duration; so should payphone compensation payments. In the end, PSPs are offering the public time on their phones, not individual calls. It is fair that users of the service pay for the use on that basis also.

**II. IF IXCS ARE UNABLE TO PAY COMPENSATION ON A MEASURED BASIS AT THIS TIME, THE COMMISSION SHOULD PROVIDE A REASONABLE TRANSITION PERIOD IN WHICH TO DEVELOP THE CAPABILITY TO DO SO**

Some IXCs object to the proposal on the ground that they do not have the systems in place to pay compensation to PSPs on a per-increment basis.<sup>15/</sup> While PageNet can sympathize with their concerns and does not wish to impose any additional burdens on IXCs, it offers the following observations on the IXCs' claims.

First, the IXCs do not attempt to quantify the cost that would be necessary to pay compensation on a per-increment basis, nor do they identify precisely what information is missing now and how it could be obtained. As a result, PageNet is limited in its ability to respond to their concerns in any meaningful way.

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<sup>14/</sup> Though the LEC PSPs argue that local coin calls are flat-rated, they do not dispute that the Commission has deregulated those rates, thereby giving them the freedom to depart from flat-rated charges. In any event, in many states, the trend prior to deregulation by the FCC was to permit PSPs to charge one price for a pre-determined amount of time -- frequently three or five minutes -- with additional charges for subsequent time periods.

<sup>15/</sup> AT&T Opposition at 10; Sprint Opposition at 13.

Second, to the extent that the IXC's rely on the Commission's earlier consideration of per-minute compensation, they misread that example. In response to equitable concerns such as those PageNet presents here, the Commission originally proposed a measured compensation system in its Docket 91-35 compensation plan.<sup>16/</sup> The Commission noted that the minutes of use proposal had "certain equitable aspects," chief among them being that, "By specifying a per minute charge rather than a flat-rated per call charge, the plan would require OSPs to pay only for the time that an access code call actually utilizes payphone equipment."<sup>17/</sup>

Ultimately, the Commission abandoned the idea of per minute compensation out of a concern that tracking of the calls would be too difficult.<sup>18/</sup> Importantly, however, it is *not* true, as AT&T argues, that "the same technical problems that existed in 1991 and 1992 continue today."<sup>19/</sup> To the contrary, AT&T ignores that in 1991, per-call tracking by IXC's was not possible, whereas, now, IXC's developed that capability in response to the Commission's earlier payphone compensation orders. This development is a significant change which makes it substantially easier to implement measured compensation today than it was in 1991. Though measured compensation may have been unworkable in an era where

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<sup>16/</sup> *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Notice of Proposed Rulemaking, 6 FCC Rcd 1448, 1450 (1991).

<sup>17/</sup> *Id.*

<sup>18/</sup> *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736, 4747 (1991).

<sup>19/</sup> AT&T Opposition at 11 n.19.

per-call tracking was impossible, the carriers' ability to identify individual payphone calls today renders it possible to alter those systems to implement measured compensation as well.

Third, while PageNet understands that the IXC's payphone compensation payment systems currently do not utilize call duration as a factor, neither AT&T nor Sprint dispute that they could be modified to do so. The only additional information *vis a vis* flat-rated compensation that is necessary to administer compensation on a measured basis is information on the duration of a compensable call. Because carriers already charge end users for each call on a timed basis, this information currently exists in one or more of the carrier's systems. Neither AT&T nor Sprint contest that duration information already is tracked by IXCs. Rather, the difficulty appears to be not in the tracking capability, but in the separate systems used to process and pay compensation to PSPs. It appears that, in order to pay compensation, IXCs must flag the call duration along with other information used to track payphone calls and then must modify their payment systems to multiply a per-increment compensation rate by the call duration.

PageNet suggests that the way to respond to this concern is to provide IXCs with a reasonable transition period to allow time for these changes to be implemented. However, if a transition is adopted, it is critical that the Commission immediately address the inequity created by extremely short duration calls. PageNet recommends that the Commission adopt a two-tiered compensation rate applicable during this transition period. For all calls over one minute in duration, compensation should be set at the 28.4 cents/call rate currently prescribed (or at whatever revised level is adopted on reconsideration). For calls of one minute or less, compensation should be set at a rate equal to 28.4 cents (or the revised

compensation amount) divided by the average duration for a dial around call. Record evidence suggests that this average is between 4 and 7 minutes per call.<sup>20/</sup> Thus, the interim short duration compensation amount should be set at between one-fourth and one-seventh of the default compensation amount.

### **III. OTHER ISSUES**

#### **A. The Commission Has Given Sufficient Notice in this Docket for the Implementation of a Measured Rate.**

Sprint claims that the issue of a measured rate of compensation has not been raised in this proceeding.<sup>21/</sup> Further, Sprint suggests that a further notice of proposed rulemaking should be issued in order to further explore this issue.<sup>22/</sup> But there is no need for these additional procedures and their associated cost and delay. To the contrary, the language of the Commission's NPRM in this docket is clearly sufficient to encompass the implementation of compensation rates based on duration. It is well-established in the case law that an NPRM is sufficient if the Court determines that "the final rule promulgated by the agency is a 'logical outgrowth' of the proposed rule."<sup>23/</sup> Only if "the changes are so major that the

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<sup>20/</sup> *See, supra*, pp. 3-4.

<sup>21/</sup> Sprint Opposition at 13-14.

<sup>22/</sup> *Id.* at 14; *see also* APCC Opposition at 40.

<sup>23/</sup> *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir. 1994).

original notice did not adequately frame the subjects for discussion," is the final rule not a "logical outgrowth" of the proposed rule.<sup>24/</sup>

The idea of measured use compensation is a "logical outgrowth" of, if not a direct answer to, the questions posed by the Commission in its NPRM. In the NPRM, the Commission sought comment on how to establish a compensation mechanism that ensures the PSP is "fairly compensated" for each use of the payphone. Specifically, the Commission asked whether it should prescribe different per-call compensation amounts for the *different types* of calls originated by payphones.<sup>25/</sup> Moreover, the Commission also sought comment on how compensation levels should be permitted to change in the future.<sup>26/</sup> PageNet's suggestion of a compensation rate based on duration is a logical response to these lines of inquiry. Within the obligation to compensate for each call, as required by Section 276(b)(1)(A) of the Act,<sup>27/</sup> the Commission recognized that different types of calls may require different amounts of compensation, and asked for comment and suggestions on approaches to achieve fair compensation. This inquiry is sufficient to put the interested public on notice that call characteristics may be relevant in establishing the final compensation amount. The duration of a call is one of these varying characteristics that the

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<sup>24/</sup> *Connecticut Light and Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 533 (D.C.Cir.), *cert. denied*, 459 U.S. 835 (1982).

<sup>25/</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Notice of Proposed Rulemaking*, 11 FCC Rcd 6716, ¶ 38 (1996) ("1996 NPRM").

<sup>26/</sup> *Id.*.

<sup>27/</sup> 47 U.S.C. § 276(b)(1)(A).

NPRM thus gave notice might be relevant. Therefore, compensation based on increments of use is a "logical outgrowth" of the Commission's initial inquiry.

**B. A Ten Minute Cap is Required to Ensure that Compensation is Equitable.**

In its Opposition, APCC argues that a cap on compensation to prevent excessive charges on calls of long duration is one alternative among several proposed that "range from the unworkable to those barred by statute."<sup>28/</sup> As shown above, compensation at a measured rate is not only within the statute, but also entirely feasible. Moreover, a cap on the compensation amount is a reasonable way to ensure fairness not only for short duration calls, but also for those of exceedingly long durations. A cap is a commonly used device in 0+ commissions and payphone-imposed fees as a way to avoid charges that are far above those called for by notions of fairness.

To the extent APCC quibbles with the level at which the cap is triggered, PageNet submits that ten minutes is reasonable. The ten minute cap based on a common industry estimate that the overwhelming majority of calls are ten minutes or less in duration. In fact, this estimate is supported by call duration data available in this docket. If, as the LEC PSPs's data suggested, the average call is 5 minutes, it is likely that a great majority of calls will be ten minutes or less. Moreover, the Commission's report to Congress in response to TOCSIA indicates call durations for all operator services calls are approximately 7.5 minutes.<sup>29/</sup> Because operator service calls can involve substantial set-up times (for live

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<sup>28/</sup> APCC Opposition at 38.

<sup>29/</sup> See, *supra*, pp. 3-4.

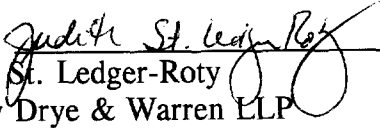
operator intervention, for example), one would expect operator service calls to be among the longer types of compensable calls originating from payphones. Thus, the data supports the inference that a ten minute cap would capture most, if not nearly all, payphone-originated calls.

### CONCLUSION

For the foregoing reasons, and for the reasons explained in PageNet's *Petition*, the Commission should reconsider its prescription of flat-rate compensation in the *Second Report and Order*. The Commission should adopt a compensation amount which apportions the payphone compensation obligation on per-increment basis, rather than per-call basis, subject to a cap to avoid overpayment on exceptionally long calls.

Respectfully submitted,

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